

IN THE SUPREME COURT OF THE UNITED STATES

**James C. Davis, as Director General of Railroads, and
Agent under Section 206 "Transportation Act 1920,"**
Petitioner.

vs.

A. E. Manry,
Respondent.

**BRIEF FOR PETITIONER
ON THE PETITION FOR CERTIORARI.**

I

The tender of an engine has no roof and therefore section 2 of the Safety Appliance Act does not apply.

Section 2 of the Safety Appliance Act of April 14, 1910, (36 Stat. 298; U. S. Comp. Stat. Sec. 8618) provides as follows:

"All cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders."

The tender of this engine had no roof. It had an open top and was loaded with coal. It is obvious that the Act does not apply to open cars, such as tenders, gondolas, or other open cars. It would be impossible to put a hand hold or grab iron on the roof of a car which had no roof.

"The congressional purpose in enacting Sec. 2 of the Act is very plain. At the time the Act was passed railroad carriers had in service many box cars; requiring for their proper use secure ladders and secure handholds or grab irons on their roofs at the tops of such ladders, and the purpose of this section clearly is to convert the general legal duty of exercising ordinary care to provide such safety appliances and to keep them in repair into a statutory, an absolute and imperative duty of making them 'secure' and to enforce this duty by appropriately severe penalties."

Illinois Central R. R. Co. v. Williams, 242 U. S. 462, 466

II

Even if the Statute does **require** a hand hold at the top of the ladder of a tender, the flare or flange on the rear of the tender at its top is sufficient hand hold or grab iron.

The Statute does not require any particular form of hand hold or grab iron. The top of the tender is so shaped and is of such size that it is adequate as a hand hold. The reason a hand hold or grab iron is required on the roof of a car is because a man cannot get a purchase with his hand on the roof of a car when he is ascending or descending the ladder and is near the top of the ladder.

III

The construction put by the Interstate Commerce Commission on the Act, with which the practice of the Railroads

accords, is persuasive when the construction of the Act is doubtful.

"While a custom of railroads cannot justify a violation of a mandatory statute, a custom which has the sanction of the Interstate Commerce Commission is persuasive of the meaning of that statute."

Pennell v. Philadelphia etc. Ry. Co. 231 U. S. 675.

Section 3 of said Safety Appliance Act provides that the Interstate Commerce Commission "shall designate the number, dimensions, location, and manner of application of the appliances provided for by section 2." In the detailed specification promulgated by the Commission there is no provision for grab irons or hand holds at the top of ladders on tenders of engines. The rule which relates to ladders on tenders which was conceded by both sides to apply, is as follows:

"A suitable metal end or side ladder shall be applied to all tanks more than forty-eight inches in height, measured from top end of sill, and securely fastened with bolts or rivets."

(Record, Pages 58, 59).

The practice of the Government inspectors is not to condemn tenders without this special appliance at the top of the ladder. (Record page 50).

The general practice among railroads is not to equip the tenders with grab irons or hand holds at the tops of ladders. (Record, pages 51, 53).

IV

There is nothing in the decision in *Johnson v. Southern Pacific Company*, 196 U. S. 1, which militates against our position.

The Safety Appliance Act of March 2, 1893 (27 Stat. 531; U. S. Comp. Stat. 8608) prohibited the use of any car not equipped with automatic couplers. In the above stated case the Supreme Court held that statute applicable to a locomotive, although a locomotive was not specifically mentioned by the terms of that Act. But the question involved in the Johnson case and in the case at bar are totally different. It was within the spirit and purpose of the Safety Appliance Act of March 2, 1893, that a locomotive should be equipped with automatic couplers, as well as any other car; but in the case at bar it is not within the reason or spirit of the Safety Appliance Act of 1910 that an open top tender should have a grab iron on its roof, when it has no roof, and when the construction of the top of the tender is such that it serves as a hand hold.

The Act of 1903 (U. S. Comp. Stat. Sec. 8616) provides that the Act of 1893 with reference to automatic couplers, grab irons, etc., should apply to all trains, locomotives, tenders, cars and smiliar vehicles used in Interstate Commerce. This Court held that this Act did not require an automatic coupler *between* the engine and the tender, and that the statute as amended, was complied with, if there was an automatic coupler at the rear of the tender.

Pennell v. Philadelphia etc. Ry. Co., 231 U. S. 675.

V

This question is of importance to all railroads in the United States and the decision of the Court of Appeals should be reviewed in the interest of uniformity.

The violation of the Safety Appliance Act involves not only civil but criminal liability of the railroad company. The general practice among railroads is not to put hand holds or grab irons at the tops of ladders on tenders. If the interpretation put on the act by the Court of Appeals is right,

all the railroads in the United States would have to change the construction of their tenders in this particular. The decision of the Court of Appeals, of course, is not binding authority outside of the State of Georgia, but it is persuasive and leaves the railroads in doubt as to the proper interpretation of the Act.

Respectfully submitted,

T. M. Cumpham
J. J. Hopman

Attorneys for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1923

No. 147

**JAMES C. DAVIS, as Director General of Railroads,
and Agent Under Section 206 Transportation Act
1920,**

Petitioner.

vs.

A. E. MANRY

**On Writ of Certiorari to the Court of Appeals of the
State of Georgia.**

BRIEF FOR PETITIONER

**T. M. CUNNINGHAM, JR.,
I. J. HOFMAYER,**

Attorneys for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1923

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JAMES C. DAVIS, as Director General of Railroads,
and Agent Under Section 206 Transportation Act
1920,

Petitioner.

vs.

A. E. MANRY

*On Writ of Certiorari to the Court of Appeals of the
State of Georgia.*

BRIEF FOR PETITIONER

STATEMENT OF THE CASE.

1. The Respondent, A. E. Manry, brought an action against the predecessor of Petitioner in the Superior Court of Lee County, Georgia, for damages for personal injuries, and recovered a judgment for \$7,500, which was affirmed by the Court of Appeals of the State of Georgia, the decision of which became a final judgment of the highest Court of the State of Georgia in which a decision could be had. The Supreme Court of the

United States granted a writ of certiorari upon the above stated petition.

2. Manry was Baggage Master on a passenger train which was running between Macon, Georgia, and Montgomery, Alabama, on the Central of Georgia Railway, operated by the Director General of Railroads. At Smithville, Georgia, the engine and tender (No. 1616) was detached from the train and went to the coal chute to get coal. Manry went with the engine to the coal chute to assist in coaling the engine and to assist in coupling the engine and tender to the train, both of which were within the scope of his duties. When the engine finished coaling, Manry stepped from the coal chute to the tender and the engine and tender began to back up to couple the tender to the train. Manry walked over the coal on the tender to the back of the tender and was about to descend a ladder on the rear of the tender with the purpose of coupling the tender to the train. He claims that just as he was about to step over the back of the tender to the ladder, the engine gave a sudden jerk and he was thrown to the ground between the tender and the train, and his legs were cut off. His contention was that there should have been a hand hold or grab iron on the tender at the top of the ladder; and that there was none; and that his injuries were caused by the sudden jerk of the train and the absence of a hand hold or grab iron.

3. Manry being engaged at the time in interstate commerce, the case arises under the Federal Employers Liability Act, and turns on the construction of Section 2 of the Safety Appliance Act of April 14, 1910, (36 Stat. 298; U. S. Comp. Stat. Sec. 8618), the material portion of which is as follows:

"All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders."

The trial court and the Court of Appeals of the State of Georgia both decided that this section of the Safety Appliance Act required a hand hold or grab iron on this tender at the top of the ladder and that as there was none, that Manry was entitled to recover.

SPECIFICATION OF ERRORS.

1. A tender has no roof and the section of the Safety Appliance Act above quoted was intended to apply only to such cars as had roofs at the top of such ladders, and was not intended to be applicable to a tender or gondola or other open car without a roof.

2. Section 3 of the said Safety Appliance Act provides that the Interstate Commerce Commission "Shall designate the number, dimensions, location and manner of application of the appliances provided for by Section 2." Although the rules promulgated by the Interstate Commerce Commission prescribe with particularity the location and manner of application of the different appliances, there is no provision for grab irons or hand holds at the tops of ladders on tenders. The rule conceded by both sides to be applicable to tenders is as follows:

"A suitable metal end or side ladder shall be applied to all tanks more than forty-eight (48)

inches in height, measured from top end of sill and securely fastened with bolts or rivets."

(Record, pp. 37, 38).

This interpretation of the Act by the Interstate Commerce Commission is persuasive as to the meaning of the Act.

3. As further bearing upon the practical interpretation put by the Interstate Commerce Commission on the said section of the Act, tenders generally are not equipped with special grab irons or hand holds at the tops of ladders (Record pp. 33, 34); and tenders so equipped are passed by Government Inspectors (Record p. 32).

4. Even if the Act does require hand holds or grab irons at the tops of ladders, the flange or flare on the rear of the tender and at the top of the ladder was a sufficient hand hold or grab iron, the statute providing no particular form of hand hold or grab iron.

5. A tender and the locomotive to which it is attached does not constitute "a car" within the meaning of that clause of the Safety Appliance Act which requires hand holds or grab irons on the roofs of cars at the tops of ladders. The tender is a part of the locomotive and has no roof to which a hand hold or grab iron could be attached.

BRIEF OF THE ARGUMENT.**I.**

The requirement of Section 2 of the Safety Appliance Act as to hand holds or grab irons at the top of ladders is inapplicable to an open car such as the tender of an engine.

Exhibits "C" and "D" (Record page 43 and 44) are photographs of the rear of the tender of this engine. There was some dispute in the evidence as to whether the ladder on the rear of the tender at the time of the accident extended above the top of the tender or stopped within a few inches of the top. (Manry, Record pages 14, 38, 40; McCafferty, Record pages 32, 33, 34). But it is immaterial whether the ladder extended above the top of the tender or not. Ladders are constructed in both ways, and this question has no bearing upon the point at issue in this case.

The requirement as to hand holds or grab irons does not apply because this tender had no roof. It has an open top and was loaded with coal. The reason that the statute provided that cars should have hand holds or grab irons on their roofs at the top of ladders was to afford a secure hand hold when mounting to the top of the car or when descending from the top of the car. But when a car has no roof on it but the top of the car is open, there is no necessity for a hand hold or grab iron to be affixed to the car at the top of the ladder because the car itself furnishes a sufficient hand hold. It would be entirely unnecessary if the ladder extended above the top of the car as shown in the picture to have any hand hold or grab iron on the top of the car, and if the top of the ladder was within a few inches of the top of the car, there would likewise be no necessity for

a hand hold or grab iron on the car at the top of the ladder. If the top of the car was a flat smooth surface like the roof of a covered car, then there would be necessity for a hand hold and the statute provides for a hand hold in such a case, but where there is no necessity for a hand hold at the top of the car and where there is no roof to put one on, the statute simply does not apply.

In order to bring this case under the statute, the Court of Appeals resorted to a strained construction of the word "roofs." It held that the word "roofs" meant not only the top of a covered car but meant as well the top of an uncovered car; in fact, that the word meant the top of any car over which the employes must pass in the discharge of their duties. There was no necessity to resort to any such strained construction. The top of an open car is in and of itself the most secure hand hold that could be devised. Any mere attachment on the top of the rear of an open car would not be a safety appliance but would be just the contrary. It would interfere with and impede the security of persons ascending the ladder to get on top of the car or coming off the top of the car to descend the ladder.

There are no decided cases which throw any real light on the question.

In the case of *Pennell v. Philadelphia etc. Ry. Co.*, 231 U. S. 675, this Court held that automatic couplers are not required between the locomotive and the tender. That case arose under the Safety Appliance Act of March 2, 1893, as amended by the Act of March 2, 1903. Both locomotives and tenders were covered by the Acts, but the Supreme Court held that it was not the purpose of these Acts to require an automatic coupler between the locomotive and the tender, because they were usually intended to be more or less permanently coupled

together, and that they might be coupled without going between the locomotive and the tender.

In the case of *Johnson v. Southern Pacific Company*, 196 U. S. 1, it was held, construing the Safety Appliance Act of March 2, 1893, that a locomotive should be equipped with automatic couplers as well as any other car; that the Act applied to all cars, and that it was within the reason and spirit of the Act that a locomotive should be equipped with an automatic coupler.

"The Congressional purpose in enacting Section 2 of the Act is very plain. At the time the Act was passed railroad carriers had in service many *box cars*, requiring for their proper use secure ladders and secure hand holds or grab irons *on their roofs* at the tops of such ladders,

and the purpose of this section clearly is to convert the general legal duty of exercising ordinary care to provide such Safety Appliances and to keep them in repair, into a statutory, an absolute and imperative duty, of making them 'secure' and to enforce this duty by appropriately severe penalties."

Illinois Central R. R. Co. v. Williams, 242 U. S. 462, 466.

II.

The construction put by the Interstate Commerce Commission on the Act, with which the railroad practice accords, is persuasive when the construction of the Act is doubtful.

Section 3 of this Safety Appliance Act provides that the Interstate Commerce Commission "shall designate the number, dimensions, location, and manner of application of the appliances provided for by Section 2."

In the detailed specifications promulgated by the Commission, there is no provision for grab irons or hand holds at the top of ladders on tenders of engines, or other open top cars. The rule which relates to ladders on tenders which was conceded by both sides to apply is as follows:

"A suitable metal end or side ladder shall be applied to all tanks more than 48 inches in height measured from top end of sill and securely fastened with bolts or rivets."

(Record, pp. 37, 38).

The practice of the Government Inspectors of the Interstate Commerce Commission is not to condemn tenders without hand holds or grab irons at the top of the ladder.

(Record, p. 32).

The general practice among railroads is not to equip tenders with grab irons or hand holds at the top of the ladders.

(Record, pp. 33, 34).

"While a custom of railroads cannot justify a violation of a mandatory statute, a custom which has the sanction of the Interstate Commerce Commission is persuasive of the meaning of that Statute."

Pennell v. Philadelphia, etc. Ry. Co., 231 U. S. 675.

III.

Even if the Statute does require a hand hold or grab iron at the top of the ladder of a tender, the flare or flange on the rear of the tender at the top of the ladder is a sufficient hand hold or grab iron.

The Statute does not require any particular form of hand hold or grab iron. The top of the tender is so shaped and is of such size that it is adequate as a hand hold. The top of the tender is itself a hand hold. The photographs in the record show the flare or flange at the top of the tender. The top of the tender is a more secure hand hold than a hand hold or grab iron bolted on to the top of the tender. A car which is covered by a roof must for security have a hand hold or grab iron bolted on to the top of the roof so as to afford a secure purchase for the hand. The Statute can be satisfied by holding that the top of the tender or the top of any other open car is itself a secure hand hold.

Respectfully submitted,

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